SUPREME COURT, U.S.

Supreme Court, U.S.
FILED
OCT 13 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. A-54

71 - 230

NEWARK TEACHERS UNION, etc., *et al.*,
Petitioners,

v.

THE BOARD OF EDUCATION OF NEWARK, etc.,
Respondent.

IN THE MATTER
of
NEWARK TEACHERS UNION, LOCAL 481, etc., and ONE HUNDRED EIGHTY-FIVE (185) OTHERS, Charged with Contempt of Court,
Petitioners.

IN THE MATTER
of
JOAN STEVENS, Charged with Contempt of Court,
Petitioner.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

JOSEPH P. LORDI,
Essex County Prosecutor,
Attorney for Respondent,
Essex County Courts Building,
Newark, New Jersey, 07102.

On the Brief:
DAVID NOAH DUBROW,
Assistant Prosecutor.
R. BENJAMIN COHEN,
Assistant Prosecutor.

TABLE OF CONTENTS

	PAGE
STATEMENT OF THE CASE	2
HOW FEDERAL QUESTIONS WERE PRESENTED	8
REASONS FOR DENYING THIS WRIT:	
I—Several of the federal questions presented herein were either not presented below or were not properly presented	10
II—The decisions below, involving ordinary criminal contempt proceedings, are predicated on the well-settled principle that the State's right to prohibit strikes by public employees is not violative of the petitioners' rights under the First and Fourteenth Amendments, and these decisions present no substantial federal question	13
III—Petitioners, having failed to move to dissolve or modify the injunction, may not, under the doctrine of Walker v. City of Birmingham and United States v. United Mine Workers, attack the constitutionality of said injunction in collateral contempt proceedings	21
IV—Neither the common-law prohibition against public employee strikes in New Jersey nor the injunction issued ex parte in the case sub judice were violative of the First Amendment, and both are in accord with the decisions of this Court	24

PAGE

A. New Jersey law barring strikes by public employees is constitutionally valid.... 24

B. The injunction issued by the Superior Court of New Jersey, Chancery Division, was neither overbroad nor vague 31

C. Carroll v. President and Commissioners of Princess Anne is distinguishable from the instant case 33

CONCLUSION 36

Cases Cited

Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U. S. 308, 334 (1968) 11

Aptheker v. Secretary of State, 378 U. S. 500 (1964) 20

Bailey v. Anderson, 326 U. S. 203, 260-7 (1945) 12, 13

Beck v. Washington, 369 U. S. 541, 550 (1962) 11, 12

Berry, In re, 65 Cal. Rptr. 273 (1968) 32

Board of Education, Borough of Union Beach v. N. J.E.A., et al., 53 N. J. 29, 247 A. 2d 867 (1968).....13, 14, 25-29, 31

Block, In re, 50 N. J. 494, 499 (1967).....13, 19, 25

Brown v. Massachusetts, 144 U. S. 573, 580 (1892) .. 11

Buehrer, In re, 50 N. J. 501, 512-13 (1967) 19

Cardinale v. Louisiana, 394 U. S. 437, 439 (1969) 11

Carroll v. President and Commissioners of Princess Anne, 393 U. S. 175 (1968).....33-35

Carton, In re, 48 N. J. 9 (1966), 222 A. 2d 92 21

PAGE

Chaplinsky v. New Hampshire, 315 U. S. 568 (1942) 17

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 231-2 (1897) 11

Cicenia v. Lagay, 357 U. S. 504, 507-8, n. 2 (1958) 12

City of Alcoa v. International Broth. of Elec. Wkrs., 203 Tenn. 12, 308 S. W. 2d 476 (Sup. Ct. 1957) 24, 25

City of Los Angeles Bldg. & C. Tr. Council, 94 Cal. App. 2d 36, 210 P. 2d 305 (D. C. App. 1949), reaffirmed 109 Cal. App. 2d 81, 240 P. 2d 16 (D. C. App. 1952) 24

City of Manchester v. Manchester Teachers Guild, 100 N. H. 507, 131 A. 2d 59 (Sup. Ct. 1957) 24

Delaware River Authority v. International Organization of Masters, Mates and Pilots, 45 N. J. 138, 211 A. 2d 789 (1965).....13, 15, 17

Dombrowski v. Pfister, 380 U. S. 479 (1965) 20

Donevero v. Jersey City Incinerator Authority, 75 N. J. Super. 217, 182 A. 2d 596 (Law Div. 1962), rev'd on other grounds 13, 14, 24

Edelman v. California, 344 U. S. 357 (1953) 12

Fox v. Washington, 236 U. S. 273, 277 (1915) 17

Giboney v. Empire Storage Co., 336 U. S. 490 (1948)..16, 27

Godchaux Co. v. Estopinal, 251 U. S. 179, 181 (1919) 11

Gompers v. Bucks Stove Range Co., 221 U. S. 418, 450 (1911) 22

Head v. Special School District No. One, et al., 182 N. W. 2d 887 (Minn. Sup. Ct. 1970) 15, 16

PAGE

Howat v. Kansas, 258 U. S. 181 (1922) 22

Hughes v. Superior Court, 339 U. S. 460 (1949) 27

Hulbert v. Chicago, 202 U. S. 275 (1906) 11

Intl. Brotherhood of Teamsters Union v. Hanke, 339 U. S. 470 (1949) 27

International Brotherhood, etc. v. Vogt, Inc., 354 U. S. 284 (1957) 17, 27

Jefferson City Teachers Association v. Board of Education, 463 S. W. 2d 627 (Ky. Ct. of App. 1971) 15

Kasper v. Brittain, 245 F. 2d 92, 96 (6th Cir. 1957) 21

Kirker v. Moore, 308 F. Supp. 615 (S. D. W. Va. 1970) 15

McAleer v. New Jersey Incinerator Authority, 79 N. J. Super. 142, 190 A. 2d 891 (App. Div. 1963) 13, 24

McAm v. New York Stock Exchange, 80 F. 2d 211, 214 (2d Cir. 1935) 21

McLeod v. Majors, 102 F. 2d 128 (5th Cir. 1939).... 21

Michel v. Louisiana, 350 U. S. 91, 97 (1955) 12

Minneapolis Federation of Teachers v. Obermeyer, 275 Minn. 347, 147 N. W. 2d 358 (1966)..... 16

Mutual Life Ins. Co. v. McGrew, 188 U. S. 291, 309 (1903) 12

NAACP v. Button, 371 U. S. 415 (1963) 32

New Jersey State AFL-CIO v. State Federation of District Boards of Education, 93 N. J. Super. 31, 224 A. 2d 519 (Ch. 1966) 31

PAGE

New Jersey Turnpike Authority v. American Federation of State Employees, 83 N. J. Super. 389, 200 A. 2d 134 (Ch. Div. 1964) 13, 15, 17, 24

Norwalk Teacher's Association v. Board of Education, 138 Conn. 269, 83 A. 2d 482 (1951) 16, 24

O'Connor v. Ohio, 385 U. S. 92-93 (1966) 13

Oxley Stove Company v. Butler County, 166 U. S. 648, 655 (1897) 10

Pawtucket v. Parent Teacher's Alliance, 87 R. I. 364, 141 A. 2d 624 (R. I. Sup. Ct. 1958) 16, 25

Port of Seattle v. International Longshore & W. U., 52 Wash. 2d 317, 324 P. 2d 1099 (Sup. Ct. 1958) 25

Railway Mail Association v. Cordi, 293 N. Y. 315, 56 N. E. 2d 721 (1944), aff'd 326 U. S. 88 (1945) 15

Rankin v. Shanker, 23 N. Y. 2d 111, 295 N. Y. S. 2d 625, 42 N. E. 2d 80 (Ct. of App. 1968) 16

Reich v. United States, 239 F. 2d 134, 138 (1st Cir. 1956) 21

School District for City of Holland, Ottawa and Allegon Counties v. Holland Educational Association, 380 Mich. 314, 157 N. W. 2d 206, 210 (1968) 31

Smith v. California, 361 U. S. 147 (1959) 20

Smotherman v. United States, 186 F. 2d 676 (10th Cir. 1950) 30

Stembridge v. Georgia, 343 U. S. 541, 547 (1952) 12

Thornhill v. Alabama, 310 U. S. 88, 104-06 (1940) 15, 27

United Federation of Postal Clerks v. Blount, No. 70-328, decided by this Court on October 12, 1971 31

United States v. Robel, 389 U. S. 258 (1967) 20

PAGE

U. S. v. United Mine Workers, 330 U. S. 258, 272 (1947) 17, 18, 21, 23

Walker v. City of Birmingham, 388 U. S. 307 (1967) 9, 21-23, 30, 35

Western Union Telegraph Co. v. International Brotherhood, 133 F. 2d 955, 957 (7th Cir. 1943) 22

Whippany Paperboard Co., Inc. v. Local 301, 11 N. J. 153, 156 (1952) 19

William Block, et als, In re, 50 N. J. 494, 236 A. 2d 584 (1967) 25

Williams v. Georgia, 349 U. S. 375, 382-3 (1955) 11

United States Constitution Cited

First Amendment 10, 13, 16-18, 20, 24, 28, 29

Fourteenth Amendment 13

New Jersey Constitution Cited

1947—

Article 1, para. 19 ..... 14, 26

paras. 8, 9 18

Statutes Cited

N.J.S. 2A:15-51 17

N.J.S. 2A:168-1 18

N.J.S. 18A:22-7 2

28 U.S.C. §1257 10

Rules Cited

Rule 4:52-1 (New Jersey) 30

Rule 23(1)(f) (United States Supreme Court) 11

PAGE

Other Authorities Cited

Annot., "Union Organization and Activities of Public Employees", 31 A. L. R. 2d 1142 (1953) 25

Cornell, "Collective Bargaining by Public Employee Groups," 107 U. Pa. L. Rev. 43, 54 (1958) 25

Note, "Labor Relations in the Public Service," 75 Harv. L. Rev. 391, 407 (1961) 25

Note, "Union Activity in Public Employment," 55 Colum. L. Rev. 343, 358 (1955) 25

Pound, "The Future of Law", 47 Yale L.J. 1, 13 (1937) 23

1 Proceedings of the New Jersey Constitutional Convention of 1947, p. 661 14

Weiner, "Wanna Make a Federal Case Out of It?" 48 A.B.A.J. 59, 60, 62 (1962) 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. A-54

NEWARK TEACHERS UNION, etc., *et al.*,

Petitioners,

v.

THE BOARD OF EDUCATION OF NEWARK, etc.,

Respondent.

IN THE MATTER

of

NEWARK TEACHERS UNION, LOCAL 481, etc., and ONE. HUNDRED EIGHTY-FIVE (185) OTHERS, Charged with Contempt of Court,

Petitioners.

IN THE MATTER

of

JOAN STEVENS, Charged with Contempt of Court,

Petitioner.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Statement of the Case

Petitioners seek a writ of certiorari to review judgments entered in the Appellate Division of the Superior Court of New Jersey on April 5, 1971, affirming petitioners' convictions in summary criminal contempt proceedings conducted by the Chancery Division of the Superior Court of New Jersey. (One of the two Appellate Division decisions is reported at 114 N. J. Super. 306). On July 7, 1971, the Supreme Court of New Jersey denied certification. 58 N. J. 603. On July 23, 1971, Mr. Justice Brennan ordered a stay of the execution of the judgments pending the disposition of the present Petition.

Petitioners' convictions arose out of their participation in an illegal strike called by the Newark Teachers Union in February, 1970. Prior to that date, the Union had been involved in negotiations with the Newark Board of Education concerning a new teachers' contract.

On December 12, 1969, the Newark Board of Education, through its Negotiating Committee, met with the Union and its representatives and agreed upon ground rules for negotiating a new teachers' contract.

On December 30, 1969, the Union delivered to the Board's Negotiating Committee its proposals, and a tentative schedule was agreed upon for the purpose of negotiations. The first negotiation meeting was held on January 5, 1970. At the meetings of December 30, and January 5, the Negotiating Committee apprised the Union and its representatives that, pursuant to N.J.S. 18A:22-7, the Board of Education's budget had to be submitted to the Board of School Estimate of the Newark school district on or before February 1, 1970, and to that end suggested that the provisions of the proposed contract relating to

budgetary matters be given priority, in order that the budget could reflect agreement between the parties. The Union rejected this suggestion.

The negotiations proceeded on a daily basis, with the total number of hours spent in negotiations, as of January 29, 1970, exceeding two hundred.

On or about January 16, 1970, the negotiator for the Union indicated that, with the February 1, 1970, deadline approaching, the policy and position of the Union would be that on January 31, 1970, if there were no contract, there would be no work. The Union issued a press release to that effect.

Subsequent to January 16, 1970, the Union actively proceeded to organize and make preparations for a strike on the first school day following the adoption of the actual budget. To this end the Union issued circulars entitled "Mass Teacher Demonstration," "Strike Instructions," and "Strike Information."

On January 31, 1970, the Board of Education, at a duly constituted public meeting, adopted a budget for 1970-71. Included in this budget was a new policy and salary guide, increasing the minimum salary of first year teachers from $6,700 to $8,000, in addition to the normal increment of $400,—a raise of $1,300 for each teacher. The Union negotiating representatives rejected the above salary and benefits proposal and indicated that at the Union meeting on February 1, 1970, they would not recommend to the membership acceptance of the new salary and benefits reflected in the budget for the year 1970-71.

Fearing the imminent threat of immediate, substantial and irreparable injury to itself, to the Newark school system, to the pupils who attended the Newark public

schools and to the public, the Board of Education applied to the Chancery Division for temporary relief. On January 31, 1970, the Chancery Division entered an order restraining the strike.

In its application for injunctive relief, the Board set forth the fact that a strike would cause irreparable, immediate and substantial injury, before notice of application for a temporary restraint could be served and a hearing had thereon. More specifically, it was alleged that if a substantial number of teachers went out on strike, the Board would be unable to obtain a sufficient number of qualified teachers to keep the schools open. If the schools could not be kept open, many children would be without adequate care and supervision during school hours, since both parents in many cases were employed. Many children would not be able to obtain lunch from the school cafeteria and many would suffer educational retrogression. Moreover, the Board stated that many children would suffer from the damaging psychological impact the strike would have. Finally, the entire City of Newark would suffer a severe setback from a strike affecting the City's school system.

The Restraining Order of January 31, 1970, applied to the Union, the New Jersey State Federation of Teachers, their respective members, officers, directors, committee members, employees, agents, and representatives, certain named Union officers, and all persons acting in behalf of or in concert with the above. The order prohibited the above-enumerated persons from:

> (a) causing . . ., etc. any strike against the Newark Board of Education;
>
> (b) picketing . . ., etc. in the vicinity of any of the public schools or other Board of Education buildings;

(c) Doing any act to interfere . . ., etc. with the construction of any building of the Board of Education;

(d) Agreeing, conspiring, or combining to do any of the above acts.

The Restraining Order of January 31, 1970, provided that those enjoined (petitioners herein) could move for dissolution or modification of the restraints on two days' notice. At no time did anyone ever move to dissolve or modify the restraints.

The Union and its representatives held a meeting on February 1, 1970, to call for a strike vote pursuant to a notice entitled "Strike Vote Meeting". The meeting was held on that date, a Sunday, and on Monday, February 2, 1970, the teachers' strike commenced amidst a great deal of publicity in the local and New York press.

The strike continued and on February 4 and 5, 1970, the Chancery Division issued Orders to Arrest six of the officers of the local Union for their violations of the Restraining Order of January 31, 1970. Each Order to Arrest specified the charges against each defendant and also specified a date for his hearing.

On February 6, 1970, the Chancery Division issued an Order directing the Essex County Prosecutor to investigate the strike and counsel the Court. The Order specifically directed the Prosecutor to investigate the conduct of the strike for the purpose of ascertaining and presenting facts relating to the identity of the individuals who violated the Restraining Order, and the nature of their conduct in committing such violations. The stated purpose of the Order of February 6, was to provide that contempt proceedings be instituted against those violating the Restraining Order.

Nevertheless, the strike continued on February 6, and February 9, drawing extensive coverage in the news media.

On February 10, 1970, the Chancery Division, relying upon affidavits submitted, issued an Order directing the Essex County Sheriff and his designated representatives, under the supervision of the Essex County Prosecutor, to arrest any individual who in their presence was observed to violate the Restraining Order of January 31.

The affidavits alleged a concerted, coordinated effort on the part of the strikers and pickets to avoid identification by law enforcement officers. Arrests of strikers and pickets were made on February 11, 13, 17, 18, 19 and 20. Approximately one hundred and ninety persons were arrested during this period. Each of the persons arrested was served with an Order continuing his arrest, setting bail and charging him with contempt of court for violation of the Restraining Order. These individual Orders enumerated the charges against each defendant and specified these charges as follows:

(a) striking, etc.

(b) picketing, etc.

(c) interfering, etc. with the Newark Board of Education in the performance of its duties.

Hearing dates for the contempt proceedings were set forth in each Order.

As a supplementary procedure each person arrested was served with a complaint by the Sheriff's Department. These complaints alleged contempt of court for violation of the Restraining Order in that the person named:

(a) assembled with others and picketed;

(b) refused to comply with the terms of the Restraining Order.

The petitioners were tried in groups in summary contempt proceedings. The evidence produced by the State at each trial was substantially the same for the vast majority of the petitioners. The State introduced into evidence the Restraining Order of January 31, the Arrest Orders of February 4 and 5, the Arrest Order of February 10, and the Orders charging each petitioner with specific acts of contempt. The State introduced numerous newspaper articles from both the Newark and New York press to show the extensive coverage given to the strike and the widespread dissemination of notice of the strike and of the Restraining Order throughout the community. Testimony was produced relating to the Union meetings of February 1, and February 8, 1970, at which times the Restraining Order was mentioned by several speakers. There was oral testimony placing many of the petitioners at one or both of these meetings. Members of the Sheriff's Department testified that they served copies of the Restraining Order on local Union leaders by leaving the copies at their homes. There was also testimony as to the arrest of several Union leaders prior to February 11, 1970. The Superintendent of Schools testified generally as to the number of teachers absent throughout the school system from February 2 through February 25, while the principal or vice-principal of each school involved testified as to the specific absences of each petitioner from school throughout the course of the strike. The State put into evidence Section 515.1 of the Board of Education Rules which provides that "teachers prevented from attending school shall immediately notify the principal." The principal or vice-principal of each

school also testified as to the posting of the Restraining Order on the bulletin board in each school. There was substantial testimony identifying various petitioners as being on picket lines on specific dates, as well as photographs depicting numerous petitioners picketing at various schools and the Board of Education building, and showing petitioners being handed copies of the Restraining Order. There was evidence of many of the petitioners carrying or wearing signs bearing messages in furtherance of the strike. Finally, the State produced oral testimony of the substance of the Restraining Order being read to the pickets on many of the dates in question.

All of the petitioners were convicted of contempt of court.

How Federal Questions Were Presented

Several of the federal questions herein presented were not properly presented below.

At the trial level one teacher, Joan Stevens, was represented by her own counsel while the Union and the other 185 individuals were represented by a different attorney. Two separate appeals were taken to the Appellate Division of the Superior Court. Several issues were raised in Joan Stevens' appeal that were not raised in the NTU (Newark Teachers Union) appeal. Similarly, issues were raised in the NTU appeal which were not raised in the Stevens appeal. The Appellate Division rendered two separate opinions which, accordingly, dealt with the different issues raised in each case.

After the Appellate Division decisions were handed down, petitioners' present counsel were substituted as counsel for the NTU and the 185 individuals. Apparent-

ly, present counsel were also substituted as counsel for Joan Stevens, although no formal substitution of attorney can be located. A single Petition for Certification was filed in the Supreme Court of New Jersey under a single docket number. This petition bore separate captions for Joan Stevens and for the NTU and the 185 individuals. Apparently, no formal motion to consolidate the two cases was ever made. The Supreme Court of New Jersey denied the joint petition for certification. The separate captions were retained in the Petition for Stay. Petitioners then petitioned this Court for a writ of certiorari. At this juncture and for the first time the separate captions are deleted.

Petitioners contend (on page 11 of their Petition) that the questions of the alleged overbreadth and vagueness of the injunction were raised before the Appellate Division and decided. Respondent submits that this issue was never properly framed in the NTU brief, nor was this issue dealt with in the Appellate Division opinion in the NTU case.

It is uncontroverted that the applicability of *Walker* v. *City of Birmingham,* 388 U. S. 307 (1967), was not raised, argued or decided in the NTU Appellate Division case.

Petitioners contend (at page 12 of their petition) that the question of the failure to give notice of the issuance of the *ex parte* restraining order was "inherent" in the Appellate Division brief of Joan Stevens, and that the Appellate Division "apparently" focused on this issue. Respondent submits that this issue was not raised in the Joan Stevens brief, nor was it dealt with in the Appellate Division opinion in that case. Moreover, it is uncontroverted that this notice question was not raised, argued or decided in the NTU Appellate Division case.

The issue of the constitutionality of the common law prohibition against strikes by public employees (embodied in the New Jersey Constitution) was first raised in the Petition for Certification to the Supreme Court of New Jersey. (Petitioners conceded this fact at pages *ii-iii* of their Petition for Certification). The more specific First Amendment attack on the "common law rule of New Jersey" is now raised for the first time in the Petition to this Court for writ of certiorari.

REASONS FOR DENYING THIS WRIT

I

Several of the federal questions presented herein were either not presented below or were not properly presented.

It is essential to the jurisdiction of this Court under 28 U.S.C. §1257 that a substantial federal question have been properly raised in the state court proceeding below. See Wiener, "Wanna Make a Federal Case Out of It?" 48 A.B.A.J. 59, 60, 62 (1962). There are two basic requirements of particularity in the proper framing of a federal question. First, the question must make reference to a particular clause of the federal Constitution relied upon, as well as the rights claimed thereunder. Second, the jurisdiction of this Court cannot arise from mere inference but only from averments so distinct and positive as to place it beyond question that a party intended to assert a federal right. *Oxley Stove Company* v. *Butler County,* 166 U. S. 648, 655 (1897). Several of the questions petitioners attempt to raise have not met these standards. (See "How Federal Questions Were Presented," *supra*).

Once a substantial federal question has been properly framed, it becomes important that it be raised at the proper point in the state court proceeding. *Godchaux Co.* v. *Estopinal*, 251 U. S. 179, 181 (1919); *Beck* v. *Washington*, 369 U. S. 541, 550 (1962). "The rule that in cases coming from state courts this Court may review only those issues which were presented to the state court is not discretionary but jurisdictional." *Amalgamated Food Employees Union* v. *Logan Valley Plaza*, 391 U. S. 308, 334 (1968) (dissent).[1] This factor is especially significant where, as here, the highest state court has failed or refused to pass expressly upon the federal questions. In this situation, the petitioners have the burden of showing that they properly raised the questions, so that the state court's failure to deal with them was not for want of proper presentation. As Rule 23(1)(f) of this Court states, a petitioner seeking review of a state court decision must "specify the stage in the proceedings in the court of first instance and in the appellate court at which, and the manner in which, the federal questions sought to be reviewed were raised. . . ."

"A state procedural rule which forbids the raising of federal questions at late stages in the case, or by any other than a prescribed method, has been recognized as a valid exercise of state power." *Williams* v. *Georgia*, 349 U. S. 375, 382-3 (1955). See *Hulbert* v. *Chicago*, 202 U. S. 275 (1906) (complete failure to raise question at trial court level); *Brown* v. *Massachusetts*, 144 U. S. 573, 580 (1892) (failure to raise question before verdict held to be fatal); *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226,

---

[1] In *Cardinale* v. *Louisiana*, 394 U. S. 437, 439 (1969), the Court listed various "sound reasons," in addition to a want of jurisdiction, for ignoring federal constitutional issues not raised, preserved, or passed upon in the state courts below.

231-2 (1897) (proper to raise question in motion for new trial); *Edelman* v. *California,* 344 U. S. 357 (1953) (failure to raise issue at trial). Thus a state "may attach reasonable time limitations to the assertion of federal constitutional rights," and such limitations must be respected. *Michel* v. *Louisiana,* 350 U. S. 91, 97 (1955). In *Beck* v. *Washington,* 369 U. S. 541, 550, this Court recognized the reasonableness of a state supreme court's refusal "to consider constitutional attacks upon statutes not made in the trial court even where the constitutional claims arise from the trial court's interpretation of the challenged statute."

If, as here, reasonable state procedural requirements are not observed, this Court should decline to exercise jurisdiction where the highest state court is completely silent on the federal question *Mutual Life Ins. Co.* v. *McGrew,* 188 U. S. 291, 309 (1903). This Court must assume, unless it can affirmatively be shown otherwise, that the silence is due to the procedural deficiency. *Bailey* v. *Anderson,* 326 U. S. 203, 206-7 (1945).

It has also been held that where the federal constitutional issue was not raised in the trial court, as required by state law, but was raised for the first time in a petition for rehearing addressed to the state intermediate court, the highest state court's action in refusing without opinion to hear the case precludes review on certiorari by the Supreme Court. *Stembridge* v. *Georgia,* 343 U. S. 541, 547 (1952). But cf. *Cicenia* v. *Lagay,* 357 U. S. 504, 507-8 (1958), n. 2. Such refusal by the highest state court *might* have been based upon the adequate state ground that the constitutional issue was not raised in the trial court, as required. And this Court is without jurisdiction "when the question of the existence of an adequate state ground is debatable." 343 U. S. 547-8.

Here, the question of the constitutionality of the common law rule prohibiting public employee strikes was initially raised in a Petition for Certification filed in the highest state court, which court refused to consider the case. Respondent submits that the jurisdiction of this Court cannot attach. *Bailey* v. *Anderson,* 326 U. S. 203, 206-7 (1945). Only if the highest state court actually considers and disposes of a question so raised can this Court's review be obtained. But cf. *O'Connor* v. *Ohio,* 385 U. S. 92, 93 (1966).

II

The decisions below, involving ordinary criminal contempt proceedings, are predicated on the well-settled principle that the State's right to prohibit strikes by public employees is not violative of the petitioners' rights under the First and Fourteenth Amendments, and these decisions present no substantial federal question.

It is clear that in New Jersey, as in most other states, public employees, including teachers, do not have the right to strike against the government, whether federal, state or a political subdivision of the state. *Board of Education* v. *New Jersey Education Ass'n., et al.,* 53 N. J. 29, 247 A. 2d 867 (1968); *In re Block,* 50 N. J. 494 (1967). See also *Delaware River Authority* v. *International Organization of Masters, Mates and Pilots,* 45 N. J. 138, 211 A. 2d 789 (1965); *Donevero* v. *Jersey City Incinerator Authority,* 75 N. J. Super. 217, 182 A. 2d 596 (Law Div. 1962), rev'd on other grounds; *McAleer* v. *New Jersey Incinerator Authority,* 79 N. J. Super. 142, 190 A. 2d 891 (App. Div. 1963); *New Jersey Turnpike Authority* v. *America. Federation of State Employees,* 83 N. J. Super. 389, 200 A. 2d 134 (Ch. Div. 1964).

A right to strike need not necessarily be an inherent element of the right to organize, and the New Jersey courts have recognized the distinction between public and private employment. *Board of Education* v. *New Jersey Education Ass'n. et al., supra.* Article 1, para. 19, of the New Jersey Constitution, adopted in 1947, provides:

> Persons in *private employment* shall have the right to organize and *bargain collectively.* Persons in *public* employment shall have the *right to organize,* present to and make known to the State or any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing (Emphasis supplied.)

Thus, the legislature recognized the legitimate distinction between public and private employment, and the courts (which have the responsibility of interpreting the New Jersey Constitution) cannot infer from this provision that the Legislature intended to depart from the common law rule that strikes by public employees are illegal. *Board of Education* v. *New Jersey Education Ass'n et al., supra,* at 46, 247 A. 2d at 876; *Donevero* v. *Jersey City Incinerator Authority, supra,* at 224, 182 A. 2d at 600, where the New Jersey Supreme Court in interpreting that section of the New Jersey Constitution held:

> This provision does not, in terms, confer any right on the part of public employees to strike. It was clearly the understanding and intention of the Constitutional Convention, which drafted the basic State Charter, that no such right to strike on the part of public employees was to be implied from the language used. In this respect, the then existing state of the law was not to be altered. See: *1 Proceedings of the New Jersey Constitutional Convention of 1947,* p. 661.

See also, *Kirker* v. *Moore,* 308 F. Supp. 615 (S. D. W. Va. 1970).

Clearly, the Legislature sought to make this distinction in the respective rights of private and public employees by not giving the latter the right to bargain collectively. It is well settled that the concept of collective bargaining includes the right to strike and other aspects of the private employer-employee relationship. See *Railway Mail Association* v. *Cordi,* 293 N. Y. 315, 56 N. E. 2d 721 (1944), aff'd 326 U. S. 88 (1945); *Delaware River Authority* v. *International Organization of Masters, etc., supra,* at 147-48, 211 A. 2d at 794; *New Jersey Turnpike Authority* v. *American Federation of State Employees, supra,* at 398, 200 A. 2d at 138-39. There is no constitutional prohibition preventing teachers from organizing under the banner of the Newark Teachers Union for the purpose of collective action in the presentation of grievances and proposals. They may not, however, achieve that end by coercive methods such as strikes, which would unlawfully halt the operation of the schools and adversely affect the public health, safety, and welfare. No constitutional issue is raised by this interpretation of the New Jersey Constitution.

The right of free speech is constitutionally subject to limitation by legitimate interests of the state which require such action. *Thornhill* v. *Alabama,* 310 U. S. 88, 104-06 (1940). It is clear that the Legislature, acting under police powers, may prohibit strikes in certain fields of endeavor when the interests of public health, safety, and welfare are involved. Teachers, as public employees, in whose services the State has an appreciable interest, do not have the constitutional right to strike. See *Jefferson City Teachers Association* v. *Board of Education,* 463 S. W. 2d 627 (Ky. Ct. of App. 1971); *Head* v. *Special School*

District No. One, et al., 182 N. W. 2d 887 (Minn. Sup. Ct. 1970); *Rankin* v. *Shanker,* 23 N. Y. 2d 111, 295 N. Y. S. 2d 625, 242 N. E. 2d 802 (Ct. App. 1968); *Minneapolis Federation of Teachers* v. *Obermeyer,* 275 Minn. 347, 147 N. W. 2d 358 (1966); *Pawtucket* v. *Parent Teacher's Alliance,* 87 R. I. 364, 141 A. 2d 624 (R. I. Sup. Ct. 1958); *Norwalk Teachers Association* v. *Board of Education,* 138 *Conn.* 269, 83 A. 2d 482 (1951). Thus, conduct which would otherwise be constitutionally permissible in the private employment sector can constitutionally be prohibited in the public employment sector as inconsistent with the public interest in the valid exercise of the State's police power.[2]

The fact that petitioners merely allege that their activity was protected by the First Amendment does not give rise to a First Amendment question where the activity was in violation of a valid state law. *Giboney* v. *Empire Storage Co.,* 336 U. S. 490 (1948). In the *Giboney* case, the court held that members of a labor union were properly enjoined from picketing in violation of a state law, even though the picketing involved dissemination of truthful information about a labor dispute. The court reasoned at 502:

> (I)t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed. See

---

[2] As petitioners note on page 14 of their Petition, "in a number of cases presented to this Court, petitions for writs of certiorari have been denied in cases involving contempt citations arising out of public employee strikes." For a list of these recent cases, see footnote 4 on page 14 of the Petition.

Fox v. *Washington,* 236 U. S. 273, 277 (1915); *Chaplinsky* v. *New Hampshire,* 315 U. S. 568 (1942).

See also *International Brotherhood, etc.* v. *Vogt, Inc.,* 354 U. S. 284 (1957).

That the legitimate distinction between public and private employment is constitutionally permissible is clear from the abundance of case law and statutes prohibiting strikes by public employees. Even where states have enacted anti-injunction laws to prevent abuses resulting from the use of injunctions in labor disputes, these laws have been held not to be applicable to disputes between the state or any political subdivision and its own employees. *United States* v. *United Mine Workers,* 330 U. S. 258, 272 (1947); *N. J. Turnpike Authority* v. *American Federation of State Employees,* 83 N. J. Super. 389; *Delaware River and Bay Authority* v. *International Organization of Masters, Mates and Pilots,* 45 N. J. 138.

Petitioners contend that the imposition of jail sentences upon conviction of contempt of court is designed to "chill" or "freeze" the exercise by public employees of their right, under the First Amendment, to associate in and support a union. The State of New Jersey and its courts have no such desire. Unions long ago achieved in our State a status of recognition and respect. Indeed, New Jersey law forbids the issuance of restraining orders or injunctions against peaceful activities by non-public employees and unions involved in labor disputes. N.J.S. 2A:15-51. The meting out of jail sentences to petitioners in the instant case cannot be said, then, to be a manifestation of either an anti-union policy or an attempt to "chill" First Amendment rights. Rather, the trial court was imposing a constitutionally permitted punishment for the contempt of

court committed by petitioners in refusing to obey the court's Restraining Order.

In New Jersey, punishment in a summary prosecution for contempt may not exceed six months' imprisonment or a fine of $1000.00, or both, subject to statutory probation provisions. *New Jersey Constitution,* 1947, Art. 1, par. 8, 9; N.J.S. 2A.168-1, *et seq.* Petitioners have conceded that their sentences were within statutory limits. Underlying their argument, however, is the disturbing theme that the violations which were the subjects of the immediate prosecutions were minor or petty in nature and that, when weighed against petitioners' First Amendment rights, the State's interest in preventing such minor or petty misconduct does not warrant the imposition of custodial sentences, no matter how minimal.

Respondent is constrained to disagree. The 1970 strike and the picketing by Newark teachers was the third in a series of labor disputes involving the Newark school system. The leniency of the courts in the past and their failure to impose custodial sentences apparently served to encourage the Union rather than to deter the contemplated strike. The strike that did occur caused serious disruption in the educational process of countless youths in the City of Newark. The fact that teachers, who are the closest representatives of government in the minds of our school children, violated with impunity court orders and statutes, makes their conduct all the more serious and objectionable. Our courts cannot continue to countenance such a public display of disregard for the law.

The fact that petitioners were convicted in summary contempt prosecutions in no way detracts from the seriousness of their transgressions against the law of New Jersey. As noted by this Court in *United States* v. *United Mineworkers,* 330 U. S. 258, 302 (1947):

> Sentences for criminal contempt are punitive in their nature and are imposed for vindicating the authority of the Court. (Citations omitted). In imposing a fine for criminal contempt, the trial judge may properly take into consideration the extent of the willful and deliberate defiance of the court's order, the seriousness of the consequences of the contumacious behavior, the necessity of effectively terminating the defendant's defiance as required by the public interest, and the importance of deterring such acts in the future. Because of the nature of these standards, great reliance must be placed upon the discretion of the trial judge.

Incarceration for the willful defiance of a court order is not novel in New Jersey. See *In re Buehrer,* 50 N. J. 501, 512-13 (1967); *In re Block,* 50 N. J. 494, 499 (1967); *Whippany Paperboard Co., Inc.* v. *Local 301,* 11 N. J. 153, 156 (1952). History has revealed that less punitive measures create disrespect for the law and encourage those persons similarly disposed to criminal conduct.

Here, rank and file members of the Union are among those involved. This does not detract from the seriousness of their antisocial conduct. Our system of law is based upon the proposition that men and women are free agents, responsible and, in the final analysis, accountable, to those whose rights they transgress. The members of the Union selected their leaders and chose to follow their orders. They helped mold the policies of the Union and in fact supported them with full knowledge of the consequences. That being the case, they are hardly in a position to complain.

The thrust of petitioners' argument is that, the illegality of their conduct notwithstanding, imprisonment is too

drastic a penalty and is thus somehow constitutionally impermissible. Neither *United States* v. *Robel*, 389 U. S. 258 (1967), *Smith* v. *California*, 361 U. S. 147 (1959), nor *Aptheker* v. *Secretary of State*, 378 U. S. 500 (1964), relied on by petitioners, supports such a proposition. In each of the three cases the Court's holding that the strictures of the statute involved were too drastic was based on a finding that the statute was so broad as to "sweep indiscriminately," and thus run afoul of the First Amendment. Certainly none of these cases stands for the proposition that a statutorily permissible jail sentence for a contempt conviction violates the First Amendment rights of the person sentenced or of any other person. The term "chill" as referring to fragile First Amendment rights is a delicate term of art. *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965). To punish criminal conduct is not necessarily to "chill;" if such were the case, all penal sanctions would be deemed "chilling."

Petitioners heavily rely upon the fact that their conduct was non-violent. Again, they fail to discern the seriousness of their acts. By their willful and deliberate defiance of the law, they contributed in the most direct terms to an atmosphere of lawlessness and violence. Damage to the public is no less real because it does not involve violent acts. The public is not a mere abstraction and the injury to it caused by petitioners' conduct cannot be disputed. In light of these considerations, the sentences imposed by the trial court were not improper.

III

Petitioners, having failed to move to dissolve or modify the injunction, may not, under the doctrine of *Walker v. City of Birmingham* and *United States v. United Mine Workers*, attack the constitutionality of said injunction in collateral contempt proceedings.

Petitioners contend that the Superior Court of New Jersey, Appellate Division, misapplied *Walker* v. *City of Birmingham*, 388 U. S. 307.[3] Respondent submits that the New Jersey courts correctly applied the doctrine of *Walker* and that petitioners, not having moved to dissolve or modify the injunction, are estopped from doing so in collateral contempt proceedings.

Petitioners' attempt to distinguish the New Jersey contempt procedure from that in *Walker*; no such distinction exists. It is well settled in New Jersey that a constitutional attack against an injunction is not available to a defendant as a defense in a collateral contempt proceeding. See *In re Carton*, 48 N. J. 9 (1966), 222 A. 2d 92. For other jurisdictions, see *Kasper* v. *Brittain*, 245 F. 2d 92, 96 (6th Cir. 1957); *Reich* v. *United States*, 239 F. 2d 134, 138 (1st Cir. 1956); *McLeod* v. *Majors*, 102 F. 2d 128 (5th Cir. 1939); *McAm* v. *New York Stock Exchange*, 80 F. 2d 211, 214 (2d Cir. 1935). Even an erroneous decree must be obeyed until it is set aside by orderly review. If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then the courts are impotent and the

[3] The Appellate Division reached the question of the applicability of *Walker* only in the *Joan Stevens* case, as the injunction itself was not attacked in the *N.T.U.* case at the Appellate Division level.

judicial power a mere mockery. *Gompers* v. *Bucks Stove Range Co.,* 221 U. S. 418, 450 (1911). An injunctive decree is executory and continuing as to the object to be obtained, and operates until vacated, modified or dissolved. *Western Union Telegraph Co.* v. *International Brotherhood,* 133 F. 2d 955, 957 (7th Cir. 1943). In *Howat* v. *Kansas,* 258 U. S. 181 (1922), this Court held that an injunction must be obeyed.

> however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming but void law going to the merits of the case. It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished.

Callous disregard for a court order cannot be tolerated. The case *sub judice* is, more than was *Walker,* one in which petitioners had ample opportunity to move against the injunction and no-strike rule which they attack here. Petitioners are teachers who presumably, from the first day they engaged in their profession, knew of their State's policy regarding strikes by public employees. We are not here dealing with persons violating an injunction against picketing in support of Negro efforts to secure long-overdue civil rights, as in *Walker.* In *Walker* there was no important principle of state policy, embodied in law, counterveiling defendants' First Amendment rights. If petitioners in *Walker* were to be denied the opportunity to attack the validity of the injunction in collateral contempt proceedings, *a fortiori* petitioners here ought not be per-

mitted to attack either the no-strike rule or the injunction, when they failed to move against the injunction in the issuing court and never, until their Petition for Stay, raised the question of the constitutionality of New Jersey's common-law rule against strikes by public employees. (See Point I, *supra*).

"Civilization involves subjection of force to reason, and the agency of this subjection is law." Pound, "The Future of Law," 47 *Yale L.J.* 1, 13 (1937).

Petitioners attempt to distinguish the present case from *Walker,* arguing that the rule of *Walker* cannot possibly apply to persons not named as parties to the injunction proceeding. Some of petitioners were named parties in the injunction proceeding. There is no dispute that all petitioners had actual notice of the injunction. It would have been physically impossible to name as a party every person who might participate in the illegal strike.

To permit the constitutional attack now urged by petitioners would encourage persons dissatisfied with a law or court order and with opportunity to attack the validity of same to determine for themselves what the law ought to be and act accordingly. See opinion of Mr. Justice Frankfurter (concurring) in *Mine Workers, supra,* 330 U. S. 258, 307. Mr. Justice Stewart observed in *Walker* that "in the fair administration of justice no man can be judge in his own case . . . . [R]espect for judical process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom."

IV

Neither the common-law prohibition against public employee strikes in New Jersey nor the injunction issued *ex parte* in the case *sub judice* were violative of the First Amendment, and both are in accord with the decisions of this Court.

A. New Jersey law barring strikes by public employees is constitutionally valid.

Petitioners state that they "do not argue for an absolute right to strike" (Petition for Certiorari, at p. 25). They thus concede that the State may, in some instances, forbid strikes by public employees. They contend, however, that the common-law rule of New Jersey forbidding strikes under which the injunction in the instant case was granted, lacks precision and is, therefore, violative of the First Amendment.

Strikes by public employees are prohibited not only in New Jersey but in many other jurisdictions as well. *N. J. Turnpike Authority* v. *American, etc. Employees,* 83 N. J. Super. 389, 395, 200 A. 2d 134, 138 (Ch. Div. 1964); *Donevero* v. *Jersey City Incinerator Authority,* 75 N. J. Super. 217, 222, 182 A. 2d 596, 599 (Law Div. 1962); *McAleer* v. *Jersey City Incinerator Authority,* 79 N. J. Super. 142, 146, 190 A. 2d 891, 893 (App. Div. 1963); see also *Norwalk Teachers' Ass'n* v. *Board of Education,* 138 Conn. 269, 83 A. 2d 482 (Sup. Ct. Err. 1951); *City of Los Angeles Bldg. & C. Tr. Council,* 94 Cal. App. 2d 36, 210 P. 2d 305 (D. C. App. 1949), reaffirmed 109 Cal. App. 2d 81, 240 P. 2d 16 (D. C. App. 1952); *City of Manchester* v. *Manchester Teachers Guild,* 100 N. H. 507, 131 A. 2d 59 (Sup. Ct. 1957); *City of Alcoa* v. *International Broth. of Elec. Wkrs.,* 203 Tenn. 12, 308 S. W. 2d 476 (Sup. Ct.

1957); *City of Pawtucket* v. *Pawtucket Teachers' Alliance,* 87 R. I. 364, 141 A. 2d 624 (Sup. Ct. 1958); *Port of Seattle* v. *International Longshore & W. U.,* 52 Wash. 2d 317, 324 P. 2d 1099 (Sup. Ct. 1958); *Cornell, "Collective Bargaining by Public Employee Groups,"* 107 U. Pa. L. Rev. 43, 54 (1958); Note, *"Labor Relations in the Public Service,"* 75 *Harv. L. Rev.* 391, 407 (1961); Note, *"Union Activity in Public Employment,"* 55 *Colum. L. Rev.* 343, 358 (1955); Annot., *"Union Organization and Activities of Public Employees",* 31 A. L. R. 2d 1142 (1953).

Petitioners argue that the New Jersey rule is invalid as overbroad in that the "cases speak in absolutes in terms of the kind of public employees the strike ban encompasses" (Petition for Certiorari, at p. 21). In *In re William Block, et als,* 50 N. J. 494, 236 A. 2d 584 (1967), the New Jersey Supreme Court stated that "(W)hen government undertakes itself to meet a need, it necessarily decides the public interest requires the service, and its employees cannot reverse or frustrate that decision by a concerted refusal to meet that need." 50 N. J. at 499, 236 A. 2d at 592. Respondent submits that no New Jersey case has specifically held that the ban on strikes by public employees is applicable to every public employee without exception. The cases cited by petitioners all involve public employees employed in furnishing services clearly essential to the public. *In re William Block, et als, supra; Board of Education, Borough of Union Beach* v. *N.J.E.A. et al,* 53 N. J. 29, 247 A. 2d 867 (1968). It is not inconceivable that the New Jersey courts might find that particular public employees engaged in furnishing a service that could, by no stretch of the imagination, be deemed "essential," may legally withhold their services. We need not speculate what the New Jersey courts would do

with such a case, however; there are none who would argue (least of all petitioners) that public education is a non-essential governmental service. In any event, petitioners' argument that the rule of law is unconstitutionally imprecise because it applies to all public employees is unpersuasive. "Public employees" are a group not difficult to define. Certainly the mere size of the group of persons to which a rule of law is addressed is no constitutional impediment. It is, respondent submits, quite reasonable for a State to adopt a policy designed to insure the continuous flow to the people of the services for which they pay and which they are rightly due.

It should be noted that while the New Jersey courts have not yet failed to uphold the no-strike doctrine, it has been made clear that this doctrine, though deemed to flow from Article I, par. 19 of the 1947 New Jersey Constitution. is not constitutionally dictated. In *Board of Education, Borough of Union Beach* v. *N.J.E.A. et al, supra,* the New Jersey Supreme Court stated:

> It of course is essential to the constitutional promise of an ordered society that government shall be able to govern, and we may therefore assume the Legislature could not legislate the branches of government into idleness. Strikes do tend to bring government to a halt. Yet it need not follow that the Legislature could not find strikes to be tolerable within certain area and limits. As to a public service the Constitution does not expressly require to be furnished, the legislature, which may withdraw the service, may find some interruption should be permitted. And even where the Constitution requires a public service to be rendered, as in the case of free public schools, Art. VIII, § 4, para. 1, there may be room for legislative judgment as to

> what interruptions are compatible with the fulfillment of that mandate. (53 N. J. at 45, 247 A. 2d at 876).

Thus, the New Jersey rule against public employee strikes represents a valid policy of governmental self-defense which remains flexible and subject to sensible modification.

New Jersey having voiced a valid public policy of not permitting strikes by public employees, the courts of that State can constitutionally enforce that policy by granting injunctive relief where the rule is violated. In *International Brotherhood, etc.* v. *Vogt, Inc.*, 354 U. S. 284 (1957), Justice Frankfurter discussed the realization by the Court that "the broad pronouncements, but not the specific holding of *Thornhill* v. *Alabama*, 310 U. S. 88 (1940) had to yield 'to the impact of facts unforeseen . . .' Cases reached the Court in which a State had designed a remedy to meet a specific situation or to accomplish a particular social policy. These cases made manifest that picketing, even though 'peaceful', involved more than just communication of ideas and could not be immune from all state regulation." 354 U. S. at 289. *Giboney* v. *Empire Storage and Ice Co.*, 339 U. S. 460 (1949); *Hughes* v. *Superior Court*, 339 U. S. 460 (1949); *Intl. Brotherhood of Teamsters Union* v. *Hanke*, 339 U. S. 470 (1949). Justice Frankfurter continued:

> This series of cases, then established a broad field in which a state, in enforcing some public policy, whether of its criminal or its civil law, and whether announced by its legislature, or its courts, could constitutionally enjoin peaceful picketing aimed at effectuation of that policy. 354 U. S. at 293.

The strike by petitioners was precisely that form of conduct which the Court held that a State might validly enjoin in *Vogt, supra; i.e.,* the strike aimed at the effectuation of the valid state policy of providing free public education. Petitioners have stated that they do not argue for an absolute right to strike. Yet such an absolute right is precisely what must logically follow if teachers are permitted to strike. For there are few, if any, public services more essential to the citizens of Newark, or any other city, than public education.

Petitioners further attack the New Jersey rule of law as overbroad in that "a wide range of group activity involving concerted employee efforts is deemed to be a strike or, if not a strike, nevertheless prohibited". Respondent is constrained to disagree. While the courts must, of necessity, enjoin activity other than a self-denoted "strike", it does not necessarily follow that the New Jersey Courts will sanction a "wide range" of impingement on First Amendment-protected activity. In *Board of Education, Borough of Union Beach* v. *N.J.E.A., et al, supra,* cited by petitioners, the New Jersey Supreme Court upheld an injunction against "coercive activity," *i.e.* sanctions against individual teachers for their refusal to participate in a mass-resignation campaign. In that case, too, the court was confronted with an argument that the bar to activity was too broad and, thus, violative of the First Amendment. The court rejected this contention, stating that:

> Individuals, severally or in association, of course have the right to denounce a public body, its officers, and its programs in the most searing terms, and even with a wide margin of error. See *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964); *Garrison* v. *Loui-*

> *siana,* 379 U. S. 64, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964); *Rosenblatt* v. *Baer,* 383 U. S. 75, 86 S. Ct. 669, 15 L. Ed. 2d 597 (1966); *Ashton* v. *Kentucky,* 384 U. S. 195, 86 S. Ct. 1407, 16 L. Ed. 2d 469 (1966); *St. Amant* v. *Thompson,* 390 U. S. 727, 88 S. Ct. 1323, 20 L. Ed. 2d 262 (1968). Such condemnation may indeed be "coercive" and be intended to "compel" a public agency to bow to the wishes of the critics. It is the right of the individual and it serves equally the collective interest of society, thus to bring government before the bar of public opinion, thereby to alter its course.
>
> But although citizens, individually and in association, may thus seek to "coerce" a public body to their wish, there is no right to achieve that end by disabling the public body from acting at all. There is no right to "compel" government to change its ways by blocking the administration of the law until it yields. And this is all the trial court condemned. It is perfectly clear from its opinion that by "coercive activity" it meant the scheme of sanctions before it which was intended thus to disable the Board from performing at all by depriving it of necessary personnel. 53 N. J. at 40-41.

Thus, the New Jersey rule has not been aimed at prohibiting *any* sort of concerted employee efforts, but only those which are specifically violative of the no-strike rule of law. The *Union Beach* case is not reminiscent of the *Philadelphia Cordwainers* case as petitioners suggest but is, rather, a reaffirmation of the First Amendment rights of teachers, viewed in the perspective of a balancing of those rights with the rights of the public to the services which public school teachers have undertaken to provide.

Petitioners next argue that the rule of law is constitutionally unsound in that it does not permit defenses of excuse or justification. No authority is cited to indicate that excuse or justification are proper considerations for a trial court in determining whether violation of an injunction constitutes contempt of court which may be punished. Ordinarily, persons enjoined are bound at their peril to heed the mandate of an injunction until it is set aside by orderly judicial process. *Smotherman* v. *United States,* 186 F. 2d 676 (10th Cir. 1950). Petitioners have at no time suggested that it was impossible for them to honor the injunction. The trial court was under no obligation to hear, nor would it have been correct in considering, statements of petitioners as to why they felt they were justified in striking. Particularly since petitioners did not move to dissolve the injunction, they ought not be permitted to excuse or justify their violation of same. *Walker* v. *City of Birmingham,* 388 U. S. 307 (1967). See Point III, *supra.*

Finally, petitioners argue that New Jersey law does not "require the public employer to submit any proof to support its claim of irreparable injury." This statement is incorrect. Rule 4:52-1 of the Rules Governing Courts of the State of New Jersey, provides that an order to show cause "shall not, however, include any temporary restraints against the defendant unless he has either been given notice of the application or consents thereto or it appears from specific facts shown by affidavit or verified complaint that immediate and irreparable damage will probably result to the plaintiff before notice can be served or informally given and a hearing had thereon." The rule is clear: if there is no showing of irreparable injury, there may be no *ex parte* temporary restraint. It is equally clear that the courts of New Jersey do not lightly

issue injunctions. To authorize an injunction, the court must be reasonably satisfied that the threatened harm is likely to be committed and that defendant intends to perpetrate the act sought to be enjoined. *New Jersey State AFL-CIO* v. *State Federation of District Boards of Education,* 93 N. J. Super. 31, 224 A. 2d 519 (Ch. 1966). "Irreparable injury" sufficient to warrant an injunction is an injury which is material and for which pecuniary damages would not afford adequate compensation. *Union Beach, supra.* In the instant case a finding of impending, immediate, substantial and irreparable injury was made by the trial judge and embodied in the original Order to Show Cause and Interim Restraint. This case is therefore distinguishable from *School District for City of Holland, Ottawa and Allegon Counties* v. *Holland Educational Association,* 380 Mich. 314, 157 N. W. 2d 206, 210 (1968) cited by petitioners.

Thus New Jersey law, embodying a valid policy against strikes by public employees, is not constitutionally deficient.[4]

B. The injunction issued by the Superior Court of New Jersey, Chancery Division, was neither overbroad nor vague.

The Restraining Order issued by the Chancery Division was concededly broad in scope. Yet, not all union activities were banned. Nor were teachers enjoined from expressing their personal views concerning the situation or their opinions of the Newark Board of Education. Thus, the injunction was not designed to prevent expression of grievances by teachers or others. *Union Beach, supra.* Yet, petitioners contend that the injunction was overbroad and vague and must, therefore, fail.

---

[4] See *United Federation of Postal Clerks* v. *Blount,* No. 70-328, decided by this Court on October 12, 1971.

Petitioners contrast the holdings of the New Jersey courts in the instant case with that of the California Supreme Court in *In re Berry*, 65 Cal. Rptr. 273 (1968). The latter case is, however, distinguishable on several grounds. In *Berry*, the injunction was not limited to the prohibition of a threatened and imminent strike, as in the instant case. "On the contrary, it also proscribe[d] a vast range of activities which the union and its supporters might properly utilize to voice and publicize their demands." Nothing in the injunction here under consideration prevented or was designed to prevent the union and its members from publicizing their demands. More significantly, *In Re Berry* was decided by a court in a state which does not have a rule of law prohibiting strikes by public employees. Even the California Supreme Court, without a no-strike rule, acknowledged that it might be appropriate under given circumstances to enjoin strikes of public employees. The thrust of *Berry*, then, lends little support to petitioners' argument.

Nor is the case at bar similar to *NAACP* v. *Button*, 371 U. S. 415 (1963). In *Button*, this Court, concerned with the prospective enforcement of a statute which appeared overbroad on its face, was properly unwilling to adopt a wait-and-see approach as to state court interpretation narrowing the parameters of the act's scope. In the instant case, this Court has before it the manner in which the New Jersey courts have interpreted and enforced, through contempt proceedings, the language of the Restraining Order. No one was found to have been in contempt for expressing an opinion, for "agreeing," for "encouraging," or for "sanctioning". "Legislative judgment" was indeed exercised by the trial court in this case. In at least one instance, a group of non-teachers who were charged with contempt had the charge against them dismissed.

Nor does the mere fact that many of the petitioners were not named in the injunction make the injunction over-broad or vague. In the emergency out of which this matter arose, there was not time to determine which teachers ought to be named as defendants. Additionally, petitioners do not contend that they were unaware of the existence of the Order or of its applicability to them.

Respondent submits that there was no potential for terror in the Restraining Order. Petitioners never moved to dissolve or modify the Order, notwithstanding a short notice provision (2 days) for so doing. They did not seek to have the injunction narrowed or interpreted. Whether or not their failure to act constituted a waiver (see Point III, *supra*), such conduct would tend to weaken petitioners' contention that terror lurked in the words of the injunction. No one was terrorized by the injunction, especially petitioners. The language of the injunction embodied the desire of the court to prevent illegal strike activity, not to censor or impose limitations or petitioners' rights of free speech and lawful assembly.

C. *Carroll v. President and Commissioners of Princess Anne* is distinguishable from the instant case.

In *Carroll* v. *President and Commissioners of Princess Anne,* 393 U. S. 175 (1968), this Court held invalid a 10-day restraining order issued by a Maryland Circuit Court, which order prevented a planned anti-Negro, anti-Semitic rally.

The Court stated:

> *There is a place in our jurisprudence for ex parte issuance, without notice, of temporary restraining*

> *orders of short duration;* but there is no place within the area of basic freedoms guaranteed by the First Amendment for such orders *where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate.* (Emphasis added).

Here, unlike *Carroll, supra,* respondent set forth specific grounds militating against formal notification of petitioners prior to the issuance of the interim Restraining Order and the Court was fully satisfied that delay would cause immediate, irreparable injury to the public. The *Order to Show Cause* and *Interim Restraint* provided in pertinent part:

> This matter being opened to the court by Victor A. DeFilippo, attorney for plaintiff, and the Court having read the complaint filed herein and the affidavits attached thereto, and it appearing to the satisfaction of the Court that:
>
> A. A strike prohibited by law is being contemplated and is about to be voted upon by the defendant Newark Teachers Union, Local 481, American Federation of Teachers, A.F.L.-C.I.O., that the strike which is being contemplated is a strike by teachers and other public employees of the plaintiff, and that the said strike and picketing and other related acts in support of the strike are seriously threatened unless they are restrained;
>
> B. Immediate, substantial and irreparable injury and damage will result to and will be sustained by the plaintiff, the pupils in the public schools of the school district of Newark, New Jersey and to the general public of the City of Newark from the

said strike and from the said picketing and other related acts before notice of application for a temporary restraint or an interlocutory injunction pertaining to the said strike, picketing and other related acts can be served and a hearing had thereon;

C. The defendant, New Jersey Federation of Teachers has given its support for the said strike. The other defendants are officers of the defendant, Newark Teachers Union, Local 481, American Federation of Teachers, A.F.L.-C.I.O.;

D. Plaintiff has no adequate remedy at law.

Additionally, the court issuing the interim restraint afforded those enjoined the protection of a provision permitting them to move for dissolution or modification of the restraints on two days notice to respondent. Notwithstanding the existence of this protection, petitioners never moved to dissolve or modify the restraints. *Walker* v. *City of Birmingham,* 388 U. S. 307 (1967). Instead, they proceeded to violate the injunction and the law.

The instant case differs from the *Carroll* decision in another material and significant respect. The case *sub judice* involves a strike in violation of the State's law. The conduct sought to be restrained was a violation of the law *per se.*

Thus, *Carroll* is inapplicable to the facts in the case at bar. Petitioners were about to embark on a course of conduct that was patently illegal and there was a finding by the court that immediate and irreparable injury would result before notice could be given and a hearing held.

CONCLUSION

For the reasons set forth, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOSEPH P. LORDI,
Essex County Prosecutor,
Attorney for Respondent.

By: R. BENJAMIN COHEN,
Assistant Prosecutor.

DAVID NOAH DUBROW,
Assistant Prosecutor.